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No. 923

In the Supreme Court of the United States

OCTOBER TERM, 1969

JAMES LEE HILGENECK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Under Rule 19(1)(b):

The Court of Appeals for the Sixth Circuit has rendered a decision in conflict with the decision of the Court of Appeals for the Ninth Circuit on the same matter as follows:

(1) Under Selective Service Regulation 32 CFR, Section 1660.20(d), must the Local Board authorize and issue a Civilian Work Order, or may the Clerk or one member of the Local Board issue such an Order based upon a so-called "Implied Conditional Order" of the Local Board? 5

That the Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, or so far

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sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision as follows:

(2) Is it a denial of due process of law in violation of the Fifth Amendment to the United States Constitution, for the Trial Judge in a Selective Service case involving a conscientious objector, to excuse for cause a juror with a son serving in Viet Nam and then fail to advise defendant or his counsel until after the trial and finding of guilt, that the Trial Judge also had a son then serving in Viet Nam? 9

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NO.

JAMES LEE HILGENECK,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, James Lee Hilgeneck, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered on November 7, 1969 in the above entitled cause.

CITATION TO THE OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, printed in Appendix A hereto, *infra*, page App. 1, is unreported at the present.

JURISDICTION

The Opinion and Judgment of the Court of Appeals were filed and entered on November 7, 1969. This Petition for Writ of Certiorari will be timely filed on or before December 8, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

(1) Under Selective Service Regulation 32 CFR, Section 1660.20(d), must the Local Board authorize and issue a Civilian Work Order, or may the Clerk or one member of the Local Board issue such an Order based upon a so-called "Implied Conditional Order" of the Local Board?

(2) Is it a denial of due process of law in violation of the Fifth Amendment to the United States Constitution, for the Trial Judge in a Selective Service case involving a conscientious objector, to excuse for cause a juror with a son serving in Viet Nam and then fail to advise defendant or his counsel until after the trial and finding of guilt, that the Trial Judge also had a son then serving in Viet Nam?

(3) Is an Order to Report for Civilian Work in Lieu of Induction, a violation of the Thirteenth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in material part as follows:

> "No person shall be . . . deprived of life, liberty, or property without due process of law; . . ."

The Thirteenth Amendment to the Constitution of the United States provides in material part as follows:

"Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

REGULATIONS INVOLVED

Selective Service Regulation 32 CFR, Section 1604.59 states in material part as follows:

"Official papers issued by a Local Board may be signed by the Clerk of the Local Board if he is authorized to do so by resolution duly adopted by and entered in the Minutes of the meetings of the Local Board . . . ."

Selective Service Regulation 32 CFR, Section 1660.20(d) states in material part as follows:

"If after the meeting referred to in paragraph (c) of this Section, the Local Board and the Registrant are still unable to agree upon a type of civilian work which should be performed by the Registrant in lieu of induction, the Local Board, with the approval of the Director of Selective Service shall order the Registrant to report for civilian work . . . ."

STATEMENT OF THE CASE

The Petitioner, James Lee Hilgeneck, was indicted under a charge of violating the Universal Military Training and Service Act, 50 U.S.C.A. Section 462. Specifically he was charged with willfully and knowingly failing to perform a duty required of him under and in the execution of the Universal Military Training and Service Act in that he was charged with failing and neglecting to comply with an Order of his Local Board to report for civilian work. His trial was held before a jury on July 23, 1968, the Honorable Thaddeus M. Machrowicz, District Judge of the Eastern District of Michigan, Southern Division, pre-

siding. On July 25, 1968 a verdict of guilty was returned by the jury. The Trial Judge rendered his Order of Judgment and Order of Commitment to five (5) years imprisonment on September 18, 1968. Mr. Hilgeneck filed timely Notice of Appeal. Upon appeal, the conviction was affirmed by the Court of Appeals for the Sixth Circuit and Mr. Hilgeneck now timely files this Petition for a Writ of Certiorari to the Supreme Court of the United States.

The evidence showed at the trial that no meeting of the Local Board was ever held under the provision of 32 CFR, Section 1660.20(d) where the Local Board met to specifically authorize the issuance of an Order to Report for Civilian Service, and that no authorization was ever given to the Clerk of the Local Board under 32 CFR, Section 1604.59 to sign such an Order. Nevertheless, after the Clerk wrote to the National Director for permission to issue such an Order and received a reply, the Clerk on her own motion and without a meeting of the Local Board, issued the Order to Report for Civilian Work over her personal signature.

In addition, the Record of Proceedings reflects that, inasmuch as it was a Selective Service trial involving a conscientious objector, the Trial Judge during the voir dire examination, excused for cause one of the jurors who had a son in the service. Then, subsequent to the trial of the cause, during post-trial motion hearings, the Judge disclosed to defendant and his counsel, for the first time, that he had a son serving in Viet Nam, and yet had not disqualified himself from presiding as the Judge in the trial.

In addition, the Petitioner contends that a compulsory Civilian Work Order, issued to compel civilian work in lieu of induction, during a time when there is no declared war or national emergency, is in violation of the Thirteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT ON THE SAME MATTER AS FOLLOWS:

(1) UNDER SELECTIVE SERVICE REGULATION 32 CFR, SECTION 1660.20(d), MUST THE LOCAL BOARD AUTHORIZE AND ISSUE A CIVILIAN WORK ORDER, OR MAY THE CLERK OR ONE MEMBER OF THE LOCAL BOARD ISSUE SUCH AN ORDER BASED UPON A SO-CALLED "IMPLIED CONDITIONAL ORDER" OF THE LOCAL BOARD?

At the trial of this case the testimony elicited from the Clerk of the Local Board indicated that after authorization from the State Director had been received permitting the issuance of a Civilian Work Order on August 11, 1966, no meeting of the Board was held authorizing issuance by the Local Board. The Clerk also testified that even though she was not a member of the Board she personally signed the Order to Report. The only meeting which had been held by the Local Board with reference to the Civilian Work Order was on April 27, 1966 where the Board made a finding that the Registrant should be assigned to work of national importance as a hospital worker and that it would be appropriate for him to perform the work at University Hospital Medical Center. The Board did not authorize or direct the Clerk to issue such an Order under 32 CFR Section 1604.59, nor did it authorize the issuance of an

Order under Section 1660.20(d) when and if approval should be received from the National Director or State Director of Selective Service.

Thereafter, the National Director did authorize the issuance of an Order and that authorization was received by the Clerk of the Local Board on August 11, 1966. The Clerk personally issued the Order to Report the next day without any authorization from the Local Board.

Section 1660.20(d) of Selective Service Regulation 32 CFR, provides in relevant part as follows:

> "If after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree to a type of civilian work which should be performed by the registrant in lieu of induction, *the local board* with the approval of the Director of Selective Service, *shall order* the registrant to report for civilian work . . . ." (Emphasis added).

The Court of Appeals for the Ninth Circuit held in *Brede* v. *United States,* 396 F.2d 155 (9th Cir. 1968) that the local board must procure approval from the National Director of Selective Service prior to issuing such an order, and then after receiving approval from the National Director of Selective Service for an issuance of the civilian work order must meet and direct the issuance of the order, officially. This opinion was modified on rehearing on *Brede* v. *United States,* 400 F.2d 599 (9th Cir. 1968), but only to the extent that the Court said that if the local board had officially met and directed the issuance of the civilian work order, conditioned upon a subsequent approval from the National Director of Selective Service, and there were some proof that this was the universal administrative practice within the Selective Service system, that upon the issuance of approval for such a civilian work

order by the National Director, the Board need not again meet and direct the issuance of the order but that apparently it could be issued by one of the Board members at the Board's direction.

In this case the record is silent as to any administrative construction or practice in the issuance of such orders either locally as to the custom with this local board, or as to the universal administrative construction throughout the United States.

The obvious implication of the *Brede* case, *supra,* is that the local board, either prior to or after receipt of approval for a civilian work order from the National Director of Selective Service, must make a determination that certain types of civilian work are appropriate, that they are available for the registrant to perform, and that they intend specifically that such an order should be issued either before or after authorization from the National Director The *Brede* opinion is clear cut in its requirement that the plain language of 32 CFR, Section 1660.20(d) be complied with to the effect that the civilian work order be authorized by "the local board".

In this case, however, the Court of Appeals has in effect rendered its decision contrary to that of the Ninth Circuit in the *Brede* opinions, *supra,* inasmuch as in this case:

(a) There is no direction by the Local Board for the issuance of such an Order;

(b) There is no proof of administrative construction to show some universal administrative practice which would permit the Clerk to issue such an Order; and

(c) There is no evidence present that the Board issued authority to the Clerk of the Local Board.

In addition, Section 1604.59 of 32 CFR provides that official papers issued by a Local Board may be signed by the Clerk of the Local Board if he is authorized to do so by resolution duly adopted by and entered in the minutes of the meetings of the Local Board. The minutes of the Local Board held on April 27, 1966 for the discussion of a possible Civilian Work Order, nor any other evidence in the case, reflects that the Clerk was ever given such authority. Nevertheless, the Order was issued by the Clerk on her own motion in this case and with no authorization by the Local Board contrary to Section 1604.59, 32 CFR, and contrary to Section 1660.20(d) of 32 CFR, which requires that it be issued "by the Local Board".

Therefore, the clear mandatory language of the Regulation was ignored by the Local Board and their violation of the Regulation was approved by the Court below contrary to the decision of the Court of Appeals for the Ninth Circuit in *Brede* v. *United States, supra.*

Furthermore, the direct result of this deviation and ignoring of two regulatory provisions of the Selective Service Regulations, has the direct result of compelling the Local Board Registrant (Petitioner here) to undertake compulsory civilian work against his will and under the order of the Board, and if he refuses, directly results in his imprisonment as evidenced by the five-year sentence imposed here. This clearly is a denial of procedural and substantive due process of law in violation of the Fifth Amendment to the United States Constitution.

THAT THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION AS FOLLOWS:

(2) IS IT A DENIAL OF DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, FOR THE TRIAL JUDGE IN A SELECTIVE SERVICE CASE INVOLVING A CONSCIENTIOUS OBJECTOR, TO EXCUSE FOR CAUSE A JUROR WITH A SON SERVING IN VIET NAM AND THEN FAIL TO ADVISE DEFENDANT OR HIS COUNSEL UNTIL AFTER THE TRIAL AND FINDING OF GUILT, THAT THE TRIAL JUDGE ALSO HAD A SON SERVING IN VIET NAM?

The Record of Proceedings illustrates in this case that at the commencement of the jury trial and during the voir dire examination certain questions were asked by the Trial Judge at the request of attorney for Mr. Hilgeneck. One of the questions which was requested to be given, inasmuch as the case was a Selective Service case involving an alleged violation by a conscientious objector, was a determination as to whether or not any of the jurors had immediate members of their families serving in the Armed Forces. The Trial Judge refused to ask the question.

Later, in response to a question which was asked relative to service on a Selective Service Board, one of the jurors, Mrs. Zelpanich, volunteered as additional information that "I have a boy in the service". The Court asked

again for a germane answer and stated to the juror that he was merely asking whether she had served on the Selective Service Board or a Draft Board and Mrs. Zelpanich again repeated, no, but she had a boy in the service.

Apparently, this concerned the Judge about the response and he relented in his previous refusal to ask the jurors about military service by themselves or members of their immediate family.

Upon opening that line of questioning, the Trial Judge did subsequently excuse *for cause* not only Mrs. Zelpanich with the son in the service, but also a Mr. Valansick, who stated that he had been in the service.

Thereafter and subsequent to the trial of the cause and the finding of guilty by the jury and in hearing on post-trial motions, the Trial Judge made the following comment:

> "The court: And has no present duties which would not permit him to work like some others have who are presently, *like my son in Viet Nam* and others." (Emphasis added.)

It is significant that this was the first time any suggestion had ever been made that the Trial Judge had a son serving in the Armed Forces in Viet Nam, and partially explains his reticence initially to propose questions to the jurors about service of immediate members of their families in the Armed Forces.

In *Knapp* v. *Kinsey*, 232 F.2d, 458 (6th Cir. 1956), the Court of Appeals held applicable criteria to determine prejudice or bias which would disqualify a judge from sitting in a judicial proceeding, to bias and prejudice appearing during the course of the proceedings, which would render a judgment therein invalid. Citing various cases the Court stated that fairness required not only the absence of actual bias in the trial of cases, but the endeavor

"to prevent even the probability of unfairness." (*Knapp, supra,* p. 467).

> "Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily upon the judge." (*Knapp,* p. 467).

The probability of unfairness to the defendant in the trial of this cause thus becomes apparent from a combination of factors:

(a) The Trial Judge's initial reticence to propound questions on voir dire regarding military service of the jurors or their immediate families;

(b) His excusing for cause, those members of the jury panel who did have a son in the Armed Forces, or prior military service personally;

(c) The Judge's seeming willingness to actively assist the United States Attorney in presenting evidence most favorable to the Government's position (P. 25A, and pages immediately preceding in the Trial Transcript);

(d) The Trial Judge's refusal to charge the jury on a basic theory of the defense upon which evidence had been presented (page 67A in Appendix to Petitioner's Brief in the United States Court of Appeals for the Sixth Circuit);

(e) The Trial Judge's admission on the Record subsequent to the trial and admittedly in an offhanded way, that the defendant could not complain of pressing duties such as the Judge's own son in Viet Nam; and

(f) The voluntary statement made by two of the three Judges of the Court of Appeals in its decision of November 7, 1969, wherein they stated that "the sentence of five years imprisonment would seem to be to us to be rather severe."

The probability of such unfairness is particularly significant when viewed against the Judge excusing for cause a member of the jury panel who had a son merely serving in the "Armed Forces". If that was significant as a factor as to that juror and one other who had prior military service because of possible prejudice, it would be entirely more significant as to possible prejudice of the Trial Judge whose son was serving in Viet Nam at the time of the trial. And, doesn't the five-year sentence, voluntarily called "rather severe" by the Court of Appeals, accurately reflect that pre-judgment by the Trial Judge.

The proper administration of justice not only requires the appearance of a detached impartiality, but it also requires a " . . . . judge, whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel." *Rapp* v. *Van Dusen,* 350 F.2d, 806, 812 (3rd Cir. 1965).

It is submitted that these factors individually and collectively, had the enormous effect of denying to the defendant in the Trial Court a fair trial thereby depriving him of both procedural and substantive due process of law in violation of the Fifth Amendment to the United States Constitution. The subsequent conviction and five-year sentence deprives him of life, liberty and property without such due process.

AN IMPORTANT QUESTION OF FEDERAL LAW HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT:

(3) IS AN ORDER TO REPORT FOR CIVILIAN WORK IN LIEU OF INDUCTION, A VIOLATION OF THE THIRTEENTH AMENDMENT?

The Petitioner was charged in the Indictment with becoming a Registrant at his Local Selective Service Board

and knowingly failing to report for compulsory civilian work in violation of Section 12 of the Universal Military Training and Service Act, Section 462, Title 50, Appendix United States Code.

The Thirteenth Amendment to the United States Constitution states that:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Clearly, any Order to Report for Civilian Work in the absence of a declared war or state of national emergency would be void and in violation of the Thirteenth Amendment as previously stated, in that it constitutes involuntary servitude, and is not being done as punishment for any crime.

In *Holmes* v. *United States,* 387 F.2d, 781, Cert. Denied, 391 U. S. 936 (1967), in the dissenting opinion of Justice Douglas on the denial of certiorari, he pointed out at length that the Supreme Court of the United States has never decided the question of whether a peacetime draft or involuntary conscription is authorized under the Constitution of the United States. In support of his dissenting opinion, he cited various cases showing that the power to draft, when upheld by the Courts, had always been executed at the time when the nation was at war. (Citing *Billings* v. *Truesdell,* 321 U.S. 542; *United States* v. *MacIntosh,* 283 U.S. 605, and *United States* v. *Nugent,* 346 U.S. 1)

It was pointed out that the power to conscript was clearly a part of the war power and therefore, it follows that any Order to Report for *Civilian Work,* in the absence of a declared war or state of national emergency, would

be void and in violation of the Thirteenth Amendment, in that it constitutes "involuntary servitude" and is not being done as punishment for any crime.

The obvious intent of the framers of the Constitution, in view of the Thirteenth Amendment, coupled with the Fifth Amendment provision that no person shall be " . . . . deprived of his life, liberty or property, without due process of law" is that the liberty, privacy and integrity of the citizen would be inviolate, and not subject to disturbance by the Government, with the possible overriding exception of the necessity of compulsory military conscription in times when a declared war or overriding public emergency and public considerations have been recognized by the Congress as taking precedence.

However, the Congress, having granted an exemption from compulsory military conscription to those who are labeled "Conscientious Objectors", has exceeded the constitutional power granted to it by the United States Constitution as limited by the Thirteenth Amendment, in that, having been recognized as an exempt "conscientious objector" he should then be recognized as having the same right of liberty and privacy and to be free of involuntary servitude the same as any other citizen of the United States.

Implicit within the foregoing reasons for the Court assuming jurisdiction, is the contention of the Appellant that, requiring a *conscientious objector,* who has been found entitled to an exemption from compulsory military service, to perform compulsory *civilian work,* results in the creation of an arbitrary and discriminatory classification by requiring civilian work to be performed by conscientious objectors *only.* Other categories of persons who are eligible for the draft, but exempted for various reasons, have nevertheless *not* been required to perform civilian work in

lieu of induction. For example, the general principles of classification are stated in Selective Service Regulations, 1622.1 and 1622.2. Under the various classes are such categories as "I-S: Student Deferred by Statute", "I-Y: Registrant qualified for military service only in time of war or national emergency", "II-S: Registrant deferred because of activity in study", "III-A: Registrant with a child or children; and Registrant deferred by reason of extreme hardship to dependents", "IV-A: Registrant who has had completed service; sole surviving son", "IV-F: Registrant not qualified for any military service", and finally "V-A: Registrant over the age of liability for military service".

In observing these various categories of persons exempt from compulsory military service, only in the case of the physical disability or mental disability of a person classified IV-F, is there a question raised of physical or mental inability to perform civilian service in lieu of induction. All of the other categories, found to be exempt or unavailable for military service, do not require the performance of civilian service in lieu of induction. Certainly the exemption of persons in those classes from military service, without a corresponding obligation for civilian service in lieu of induction, grants to persons so classified an arbitrary and superior right to that of a person classified as a "Conscientious Objector" who has likewise been found entitled to an exemption but who has then arbitrarily been required to perform civilian services in the nature of involuntary servitude. This arbitrary classification, by discriminating in the manner described, has deprived a person in the classification of "Conscientious Objector" of the equal protection of the law and has deprived them of their life, liberty and property without due process of law in violation of the Fifth Amendment of the United States Constitution.

It is clear from a review of the foregoing, in view of the clear language of the Thirteenth Amendment to the United States Constitution that the circumstances are:

(a) The Work Order issued to JAMES LEE HILGENECK imposed involuntary servitude;

(b) Was not as a punishment for crime;

(c) There was no declared war or state of national emergency; and

(d) The direct result of the refusal to comply was, as evidenced here, a sentence to five years imprisonment in the Federal Penitentiary.

Under what circumstances could there possibly be a more clear cut violation of the Thirteenth and Fifth Amendments?

CONCLUSION

This case, thus, presents these three important Federal constitutional questions in a clearly justiciable setting. It is respectfully submitted that this Court should issue its Writ of Certiorari in order that it may consider and decide these questions, and it is prayed that this Court will issue its Writ of Certiorari to the Court of Appeals for the Sixth Circuit to review its Judgment.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 19400

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES LEE HILGENECK,

Defendant-Appellant.

Appeal from United States District Court
for the Eastern District of Michigan, Southern Division.

Decided November 7, 1969.

Before WEICK and MCCREE, *Circuit Judges*, and BROWN,* *District Judge.*

PER CURIAM. This appeal is from a judgment of conviction entered upon a verdict of guilty for violation of the Universal Military and Training Service Act[1] by failing to comply with an order of the Local Board to report for civilian work at the University Hospital Center, Ann Arbor, Michigan.

In his questionnaire, appellant claimed that he should be classified in the following order, either as a Jehovah's Wit-

* Honorable Bailey Brown, Chief Judge, United States District Court for the Western District of Tennessee, sitting by designation.

[1] 50 U.S.C. § 462 Appendix.

ness Minister, an agricultural worker, or a conscientious objector. His Local Board classified him as I-O (conscientious objector).

In our opinion there was basis for this classification. This is all that the law requires. *United States* v. *Mulloy,* 412 F.2d 421 (6th Cir. 1969). We find no error in the Court's instructions to the jury.

Appellant had a personal appearance before the Board. He did not appeal his classification. Later the State Selective Service Headquarters requested the Board to allow appellant to appeal, which he did, and the Appeals Board classified him I-O. We do not construe the request as one to reopen the classification. We find no failure on the part of the Board to accord to appellant his procedural rights.

We regard the summary of the meeting of the Local Board, held on April 27, 1966, as a substantial compliance with Selective Service Regulation 1666.20(c) and as authorization to the Clerk to issue the order to report for civilian work. *United States* v. *Boroski,* 412 F.2d 668 (6th Cir. 1969).

Other claims of appellant have been considered and are deemed to be without merit.

The sentence of five years' imprisonment would seem to us to be rather severe. We do not have before us the presentence report which may have justified the sentence. The District Court, however, will have the opportunity to consider reduction of the sentence if request is made under Rule 35 of the Federal Rules of Criminal Procedure. *United States* v. *Mulloy, supra.*

District Judge Brown did not join in the preceding paragraph.

Affirmed.

APPENDIX B

INDICTMENT
(Filed April 3, 1967)

THE GRAND JURY CHARGES:

That on or about August 23, 1966, in the Eastern District of Michigan, Southern Division, JAMES LEE HILGENECK, defendant herein, did wilfully and knowingly fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act and the rules, regulations and directions duly made pursuant thereto, in that he did fail and neglect to comply with an order of his local board to report to said board for instructions to proceed to University Hospital and Medical Center, Ann Arbor, Michigan to report there for employment pursuant to said instructions and to remain in such employment for twenty-four (24) consecutive months or until such time as released or transferred by proper authority; in violation of Section 462, Title 50 Appendix, United States Code.

This is a True Bill,

.....

FOREMAN

LAWRENCE GUBOW
United States Attorney
/s/ Joel M. Shere
JOEL M. SHERE
Assistant United States Attorney
Dated: .....

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

No. 19400

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES LEE HILGENECK,

Defendant-Appellant.

BEFORE: WEICK, McCREE, Circuit Judges and BROWN, District Judge.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Michigan

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39(b).

Entered by order of the Court.

Carl W. Reuss

Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 923

JAMES LEE HILGENECK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1969 (Pet. App. A). The petition for a writ of certiorari was filed on December 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, where a local draft board determined that petitioner should be assigned to civilian work as a conscientious objector (I–O) and sought approval from the National Director of Selective Service, a subsequent order to report for such work was invalid

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because it was signed and mailed by the clerk upon receipt of the Director's approval, without a further order by the local board.

2. Whether the trial judge was required to disqualify himself because he had a son in military service in Vietnam.

3. Whether an order for a conscientious objector to report for civilian work in lieu of induction constitutes involuntary servitude in violation of the 13th Amendment.

REGULATIONS INVOLVED

32 C.F.R. 1660.20 provides:

* * * * *

> (c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for that purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. * * *
>
> (d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work * * *.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan petitioner

was convicted of having violated 50 U.S.C. App. 462 by failing to comply with an order of the local board to report for civilian work at the University Hospital Medical Center, Ann Arbor, Michigan (R. 1, 13). On September 18, 1968 he was sentenced to imprisonment for a period of five years subject to parole at any time under the provisions of 18 U.S.C. 4208(a)(2) (R. 23). The court of appeals affirmed the conviction (Pet. App. A).

The trial testimony and petitioner's Selective Service file, introduced in evidence as Gov. Ex. 1 (Tr. 32),[1] show that petitioner, a Jehovah's Witness, was classified 1-O (F. 10). After being notified of this classification, petitioner informed the local board he would not accept any civilian work (F. 10, 54; Tr. 64-65).

On April 27, 1966, pursuant to 32 C.F.R. 1660.20(c), the local board, petitioner, and a representative of the State Director held a meeting for the purpose of reaching an agreement as to the type of civilian work petitioner would accept. Petitioner continued his refusal to accept civilian employment. It was then "unanimously agreed by the board members present and the State Director's representative that the registrant be assigned to work of national importance as a hospital worker and that it would be appropriate for him to perform this work at University Hospital Medical Center, Ann Arbor" (F. 67). On May 26, 1966, pursuant to 32 C.F.R. 1660.20(d), the State Director

[1] "Tr." refers to the 259-page transcript of the trial testimony which is on file before this Court. "F." refers to petitioner's Selective Service file, which we have numbered in pencil in the lower right hand corner of the pages and have lodged with the Clerk of this Court.

requested approval by the National Director of Selective Service of the local board's decision to assign petitioner to this civilian work (F. 69; Tr. 66). On June 8, 1966 the National Director approved the issuance of such an order (F. 70; Tr. 67). On August 11, 1966 the local board received authorization for this order from the State Director (F. 71; Tr. 36). On the following day (August 12), without a further meeting by the local board, the clerk of the local board signed and mailed to petitioner the order to report to the local board on August 23, 1966 for instructions to proceed to the place of employment (F. 10, 72; Tr. 33–34, 36, 81–83). Petitioner testified on his own behalf that he received this order, but that he did not report to the local board or to the hospital since he was entitled to classification as a minister (Tr. 160–161).

ARGUMENT

1. Petitioner contends that he was denied procedural due process since strict compliance with 32 C.F.R. 1660.20(d) required the local board, subsequent to its original authorization of civilian hospital work, to meet again and issue an additional order that he report for such work (Pet. 5–8). There is no substance to this technical contention.

Petitioner's reliance upon *Brede* v. *United States*, 396 F. 2d 155 (C.A. 9), as modified, 400 F. 2d 599, is misplaced. While *Brede* had originally held that, in order to comply with Section 1660.20(d), the local board had to meet again *after* receiving authorization from the National Director of Selective Service, and order the objector to report for such work, the modi-

fied decision held that the direction to report could be entered prior to authorization but subject to subsequent authorization and notice. Very recently, the Ninth Circuit, *en banc,* further restricted the *Brede* holding by finding it sufficient that a local board designate the type of employment and the employer prior to and subject to the National Director's authorization. *United States* v. *Stark,* set out in the Appendix, *infra.* Accord, *United States* v. *Isenring,* No. 17,486, C.A. 7, decided December 17, 1969.

The facts here are identical. The local board determined on April 27, 1966, not only that petitioner should be assigned to hospital work, but also that he should perform this work at the University Hospital Medical Center, Ann Arbor, Michigan. This determination constituted a direction for an order to report for such work, subject to authorization by the National Director and notice. It was not necessary that the board meet again to reaffirm this order; the action of the clerk of the board in signing and mailing this order was no more than a ministerial implementation of it.[2] *Ibid;* see *Davis* v. *United States,* 402 F. 2d 513, 514 (C.A. 5), certiorari denied, 394 U.S. 908; *United States* v. *Crowley,* 405 F. 2d 400, 403–405 (C.A. 4), certiorari denied, 394 U.S. 904; *United States* v. *Boroski,* 412 F. 2d 668, 673 (C.A. 6).

2. In impaneling the jury the court asked if "any of you have any immediate relatives or have you yourself served on any Selective Service Board or have worked for any Selective Service Board?" (Tr. 13).

[2] There is no provision in 32 C.F.R. 1604.59 (Pet. 3) which expressly prohibits the clerk from signing and mailing an order of the board, as was done in the instant case.

All jurors responded negatively, but one stated that she had a son in the service (Tr. 13, 13–A). The court then asked: "If any of you do have any immediate members of your family in the military service or if you, yourself, have served in the military service, would that fact in any way prejudice you either for or against the defendant in this case?" The juror who said her son was in the service replied that it would (Tr. 13). After the court inquired of counsel on both sides as to whether there was any objection to excusing this juror for cause and both counsel said there was no objection, the juror was excused (Tr. 13–14). A second juror, who stated that his prior military service would prejudice him, was excused for cause after counsel for both sides said they had no objection (Tr. 14). A third juror volunteered that he had been in military service but would *not* be prejudiced, and was *not* struck (*Ibid.*). In denying a post-trial motion by petitioner to appeal *in forma pauperis* the court, in commenting that petitioner was able to work to pay his legal expenses, stated that petitioner "has no present duties which would not permit him to work like some others have who are presently, *like my son* in Viet Nam and others" (Pet. 10).

The fact that the court, with the consent of both sides, allowed jurors to be excused for cause when they stated that they would be prejudiced by their service connection does not show that the judge was biased because he had a son in Viet Nam. Considering the simple issue which should properly have been before the jury—whether petitioner did or did not report for civilian work—the judge allowed the defense

great latitude in presenting his defense. While two members of the court of appeals thought the sentence severe, eligibility for parole was permitted at any time the parole board should determine. In any event, as the court of appeals pointed out, the district court will have an opportunity to consider reduction of the sentence if request is made under Rule 35, F.R. Crim. P. (Pet. App. A, 2).

3. Petitioner's contention that an order to report for civilian work in lieu of induction violates the Thirteenth Amendment (Pet. 12–16) has been consistently rejected. See *e.g., Badger* v. *United States,* 322 F. 2d 902, 908 (C.A. 9), certiorari denied, 376 U.S. 914; *United States* v *Holmes,* 387 F. 2d 781, 784 (C.A. 7), certiorari denied, 391 U.S. 936; *United States* v. *Fallon,* 407 F. 2d 621, 624 (C.A. 7), certiorari denied, 395 U.S. 908; *United States* v. *Boroski,* 412 F. 2d 668, 673 (C.A. 6). See also *Selective Draft Law Cases,* 245 U.S. 366; *United States* v. *Chandler,* 403 F. 2d 531 (C.A. 4).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1970.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22,994

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

BERT DANIEL STARK, DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before Chambers, Barnes, Hamley, Merrill, Koelsch, Browning, Duniway, Ely, Carter, Hufstedler, Wright, Kilkenny and Trask, Circuit Judges.

Merrill, Circuit Judge:

Appellant, classified I–O by his local draft board, stands convicted of failure to report for civilian work in lieu of induction into the military service. Upon appeal he asserts that no order to report was ever made by the board; that the only order issued was one by the clerk of the board and that the record is silent as to her authority. Appellant relies on *Brede* v. *United States*, 396 F. 2d 155, 400 F. 2d 599 (9th Cir. 1968). The United States suggests that *Brede* should be re-examined. The court has taken the appeal in banc for that purpose.

In *Brede* we recited the Government's contention as follows:

> The United States contends that under universal administrative construction of § 1660.20 (d), and universal administrative practice, a determination that certain work is appropriate constitutes an implied order to report for such work, subject to authorization of the National Director and notice. Consequently at the meeting of March 14, 1966, an agreement as to work was reached and an implied conditional order to report was entered and the action of the clerk of the board was no more than ministerial implementation of the order.

We then noted:

> The Government's contention may have merit in an appropriate case. Here, however, the record is silent as to administrative construction and practice, or as to any understanding of the board in such respects from which it might be found that the critical exercise of administrative judgment had been made. 400 F. 2d at page 600.

The same situation exists in this case [as in Brede]. Nevertheless we are of the view, and so hold, that where, as here (and in *Brede*), the board's determination includes not only the type of employment deemed appropriate but also the employer to whom the registrant is to report, the critical exercise of administrative judgment by the board has been made and an order to report to the specified employer (subject to authorization of the National Director) is implicit and the action of the clerk in issuing the order is merely ministerial implementation. To this extent *Brede* is hereby overruled.

Accordingly we find no error in the ruling of the District Court (prior to our holding in *Brede*), to this effect.

Other assignments of error we find to be without merit. The nature of appellant's representation by counsel at the time of trial was not such as to constitute inadequate representation. We find no prejudicial misconduct on the part of the district judge. Appellant knowingly failed to report for the assigned work and the requisite criminal intent was thus present. *Smith* v. *United States*, 391 F. 2d 543 (8th Cir. 1968). Failure to give full warnings as to appellant's constitutional rights and privileges at the meeting called for the purpose of determining appropriate employment was not contrary to *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Appellant was not then in custody; no crime had yet been committed. *United States* v. *Dicks*, 392 F. 2d 524 (4th Cir. 1968); *Noland* v. *United States*, 380 F. 2d 1016 (10th Cir. 1967).

Judgment affirmed.

Dated November 28, 1969.

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